

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

MARTIN MEDINA FLORES,

Plaintiff,

v.

No. 11-cv-0586 MV/SMV

**MICHAEL J. ASTRUE, Commissioner
of Social Security Administration,**

Defendant.

AMENDED¹ PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER is before the Court on Defendant's Motion to Dismiss in Lieu of Answer [Doc. 10] and Defendant's Memorandum in Support of Motion to Dismiss in Lieu of Answer [Doc. 11] (collectively "Motion"), filed on December 6, 2011. Plaintiff has not responded, and the time for doing so has passed.


This case was referred to the undersigned by the Honorable Martha Vázquez, United States District Judge, on February 29, 2012, for recommendation of the ultimate disposition. Order of Reference Relating to Bankruptcy Appeals, Social Security Appeals, Prisoner Cases, Non Prisoner Pro Se Cases, and Immigration Habeas Corpus Proceedings [Doc. 16].

The Court **RECOMMENDS** that the Motion be **GRANTED** because Plaintiff's failure to respond in opposition to the Motion constitutes his consent to grant the Motion. *See* D.N.M.LR-Civ. 7.1(b). Furthermore, Plaintiff failed to properly appeal the Commissioner's decisions in both of the two benefits applications at issue in this case. Specifically, the deadline to appeal the initial benefits application to this Court was on or around January 17, 2011, *see* Notice

¹ The amendment is necessary only to reflect the Court's recommendation that the Complaint [Doc. 1] be dismissed *with* prejudice.

of Appeals Council Action [Doc. 11-3], but Plaintiff's Complaint [Doc. 1] was not filed until July 1, 2011. Therefore, to the extent that Plaintiff's Complaint seeks to appeal the Commissioner's denial of his initial application, the Complaint is untimely. *See* 42 U.S.C. §§ 405(g), 405(h) (sixty days to appeal the Commissioner's final decision to the district court of the United States). With respect to Plaintiff's second benefits application, Plaintiff failed to appeal the Administrative Law Judge's decision to the Appeals Council altogether. *See* Declaration of James Jones Court Case Preparation and Review Branch 2 Office of Disability Adjudication and Review Social Security Administration [Doc. 11-1] at 4; *see also* Notice of Decision—Fully Favorable [Doc. 11-4] at 1 (advising Plaintiff that he had 60 days to file an appeal with the Appeals Council). Thus, Plaintiff has not exhausted his administrative remedies on the second application, and no judicial review is available. *See* 20 C.F.R. §, 422.210(a) (judicial review available after Appeals Council's decision or denial of review). Because the first application was not timely appealed to this Court and because Plaintiff's administrative remedies were never exhausted with respect to the second application, the Court **RECOMMENDS** that the Motion be **GRANTED** and that the Complaint [Doc. 1] be **DISMISSED with prejudice**.

THE PARTIES ARE FURTHER NOTIFIED THAT WITH FOURTEEN DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition, they may file written objections with the Clerk of the District Court pursuant to 29 U.S.C. § 636(b)(1)(c). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**


STEPHAN M. VIDMAR
UNITED STATES MAGISTRATE JUDGE